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Jun 30, 2016

Court of Appeals

Division III

State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WA

DIVISION III

No. 33874-6-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JOEL M. GROVES,

Defendant/Appellant

Respondent's Brief

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TABLE OF CONTENTS

A. RESPONSE TO ASSIGNMENTS OF ERROR.....5

B. ISSUES PRESENTED.....7

C. STATEMENT OF THE CASE.....8

D. ARGUMENT.....18

E. CONCLUSION.....31

TABLE OF AUTHORITIES

Cases

<u>Arizona v. Gant</u> , 556 U.S> 332 (2009).....	20
<u>In re Impoundment of Chevrolet Truck</u> , 148 Wn.2d 145 (2002).....	22
<u>In re LaBelle</u> , 107 Wn.2d 196 (1986).....	19
<u>Jackson v. Virginia</u> , 443 U.S. 307 (1979).....	26
<u>State v. Apodaca</u> , 67 Wn. App. 736 (1992).....	19
<u>State v. Aver</u> , 109 Wn.2d 303 (1987).....	26
<u>State v. Bales</u> , 15 Wn. App. 834 (1976).....	22
<u>State v. Barber</u> , 118 Wnd.2d 335 (1992).....	19
<u>State v. Benn</u> , 120 Wn.2d 631 (1993).....	28
<u>State v. Bennett</u> , 161 Wn.2d 303 (2007).....	29
<u>State v. Blazina</u> , 182 Wn.2d 827 (2015).....	31
<u>State v. Brett</u> , 126 Wn.2d 136 (1995).....	28
<u>State v. Brown</u> , 68 Wn. App. 480 (1993).....	26
<u>State v. Coss</u> , 87 Wn. App. 891 (1997).....	22
<u>State v. Darden</u> , 145 Wn.2d 612 (2002).....	26
<u>State v. Gluck</u> , 83 Wn.2d 424 (1974).....	25
<u>State v. Green</u> , 94 Wn.2d 216 (1980).....	26
<u>State v. Greenway</u> , 15 Wn. App. 216 (1976).....	22
<u>State v. Guloy</u> , 104 Wn.2d 412 (1985).....	26

<u>State v. Hill</u> , 68 Wn. App. 300 (1993).....	22
<u>State v. Houser</u> , 95 Wn.2d 143 (1980).....	22
<u>State v. LeFaber</u> , 128 Wn.2d 896 (1996).....	28
<u>State v. Montague</u> , 73 Wn.2d 381 (1968).....	25
<u>State v. Riley</u> , 69Wn.App. 201 (1992).....	19
<u>State v. Rowe</u> , 63. 750 (1991).....	19
<u>State v. Schulze</u> , 116 Wn.2d 154 (1991)	28
<u>State v. Simpson</u> , 95 Wn.2d 170 (1980).....	22
<u>State v. Smith</u> , 76 Wn. App. 9 (1994).....	19
<u>State v. Tyler</u> , 177 Wn.2d 690 (2013)	23
<u>State v. Williams</u> , 102 Wn.2d 733 (1984)	22
<u>State v. Zunker</u> , 112 Wn. App. 130 (2002).....	26
<u>Sullivan v. Louisiana</u> , 508 U.S. 275 (1993).....	28
<u>United States v. Edwards</u> , 577 F.2d 883 (5th Cir. 1978).....	25
<u>Victor v. Nebraska</u> , 511 U.S. 1, 5-6 (1994)	28
 <u>Statutes</u>	
RCW 69.41.030	29
RCW 69.41.030(1).....	29
 <u>Rules</u>	
CrR 3.6(b)	19
ER 404(b).....	30

Washington Pattern Jury Instructions

WPIC 55.01..... 17

WPIC 55.02..... 17

A. RESPONSE TO ASSIGNMENTS OF ERROR

- a. The court made a sufficient oral record of findings of facts; if not remand is appropriate to supplement the oral record with written findings of fact and conclusions of law
- b. The inventory search conducted by law enforcement was lawful because impound was proper and lawful.
- c. The extent of the inventory search, when attempting to ascertain ownership over a vehicle was appropriate.
- d. The scope of the inventory search in an attempt to ascertain ownership was appropriate.
- e. Trooper Carrol testified that he followed established criteria for the inventory search and impound of the motorcycle.
- f. There was sufficient evidence of intent to deliver a controlled substance when there was evidence presented regarding the quantity of the drugs, the packaging of the drugs, a scale and twenty-eight individual baggies.
- g. The WPIC given on the legend drug was appropriate and was an accurate statement of the law as proposed by defense.

- h. The testimony of the Trooper regarding his investigation of the motorcycle was proper context for the case and appropriately considered by the jury.
- i. There was no prosecutorial misconduct when evidence was presented to the jury to explain and give context for the contact police made with the defendant.
- j. The court failed to consider Mr. Groves' ability to pay when imposing Legal and Financial Obligations.

B. ISSUES PRESENTED

- a. When a court orally issues findings of fact that are clear and comprehensive is remand appropriate?
- b. In an effort to ascertain ownership consistent with a lawful impound when no reasonable alternatives are appropriate given the facts of this case, can an officer search for registration of ownership materials under the seat of a motorcycle and within two zippered pouches found there?
- c. Is there sufficient evidence to support the conviction for Possession w/Intent to deliver methamphetamine when the defendant possessed a large quantity of methamphetamine that was packaged in two packages, a scale, and twenty-

eight smaller baggies consistent with packing smaller quantities?

- d. When defense proposes and the court gives the standard WPIC for possession of a legend drug, has the jury been lawfully instructed?
- e. Can an officer can testify about his investigation and the circumstances surrounding all suspicious activity during a stop without it being improper 404(b) evidence to give context to the jury for the stop and investigation?
- f. Must a court inquire about a defendant's present and future to pay discretionary LFOs?

C. STATEMENT OF THE CASE

Joel Groves was charged by information with Count One: Possession of a Controlled Substance with Intent to Deliver and Count Two: Possession of a Legend Drug without Prescription. (CP at 1 – 2). After a trial, he was found guilty by a jury of both counts. (CP 73 – 75).

Prior to the trial, defense filed a 3.6 motion to suppress the stop (CP at 10 – 14). A pretrial hearing was conducted with testimony from Trooper Carroll at that hearing (CP at 28, RP at 74). Trooper Carroll testified that in June, 2014 he stopped the

defendant for speeding on a motorcycle just after one o'clock in the morning (RP at 74 – 75, 78). He testified that it was Washington State Patrol Policy to impound any motorcycle where the rider does not have a motorcycle endorsement (RP at 75). When he stopped Mr. Groves, Mr. Groves did not have a motorcycle endorsement on his valid license (RP at 75). He reiterated that present at the scene of the stop was his sergeant who indicated it was State Patrol policy to impound a motorcycle if there is no endorsement (RP at 76). Later in the hearing, he testified that because there had been a big increase in motorcycle serious injury crashes and fatalities over the last few years attributed to inexperienced drivers, the State Patrol had implemented a policy to impound bikes when the riders do not have an endorsement (RP at 80). He did not consider an alternative to impoundment (RP at 80 – 81).

The circumstances surrounding the authenticity and ownership were suspicious to the trooper including a plate that belonged to a Honda but that was attached to the motorcycle (that was not a Honda but was a Kawasaki), non-stock parts on the motorcycle, evidence it had been wrecked and repaired, no key, and paint all over the frame with no documentation provided by

Mr. Groves of the owner. (RP at 77, 99). When he ran the VIN number, the address for the registered owner came back in Bremerton, Washington (RP at 78). Although the trooper had suspicions of the motorcycle being stolen, it was eventually determined that the motorcycle was not reported as stolen (RP at 78).

Trooper Carroll testified that early on in the stop, he was planning to impound the motorcycle because he could not see the entire VIN number (RP at 79). When Deputy McKean from the Sheriff's Office arrived on scene, he was able to find the complete VIN from the fork or the head of the bike which gave the registered owner as being "Jessica Jones" in Bremerton. (RP at 79).

After the defendant left the scene, Trooper Carroll and Deputy McKean lifted off the seat of the motorcycle because they were trying to find ownership documents in order to impound the bike. (RP at 81). Trooper Carroll testified that is common for there to be compartments under the seat of the motorcycle where a lot of people store their documents (RP at 81, 83). There was a reddish/brown zippered case, typical of holding some sort of owner's manual that Trooper Carroll looked into in order to

confirm ownership of the motorcycle (RP at 94). There was a second black case that was similarly sized that the Trooper also looked into in an attempt to find the registered owner of the motorcycle (RP at 95).). Trooper Carroll also testified he would not have felt safe leaving the bike on the road in the area where the stop was made (RP at 93).

Mr. Groves never supplied any ownership documents to the police while he was on scene and acted very nervous (RP at 81). Trooper Carroll testified that the seat was not attached and that you could just lift the seat off (RP at 85). Mr. Groves did supply information to police about “Christian White” being the owner of the motorcycle, but police confirmed Mr. White owned the license plate that belonged to the Honda bike and not the Kawasaki motorcycle itself (RP at 89 – 90).

Mr. Groves testified at the hearing that the seat was locked onto the frame of the bike and that you had to use a key to unlock the seat to get it off the bike. (RP at 103). He testified that the key to unlock the seat was on the key ring attached to the key that was still in the ignition of the bike during the time he was at the stop (RP at 103). The court specifically inquired during the suppression hearing about what other “reasonable alternatives” existed to

impound for the officer that night (RP at 111 – 12). The court also inquired of defense as to how the Trooper was supposed to know Mr. Groves was in legal possession of the motorcycle (RP at 112).

The court entered its findings on the record in open court. Specifically he found that the impound inventory wasn't a pretext for anything, that the Trooper was attempting to establish ownership of the motorcycle (RP at 116). The court indicated, "It would be foolish for law enforcement to do anything other than impound the bike in a situation like this." (RP at 116). The defense motion to suppress the stop was denied. (RP at 116).

Defense moved to reconsider the motion and the state responded and submitted the video of the stop in response to the defense motion to reconsider (RP at 123). The motion to reconsider was denied. (RP at 124). The defense submitted a lesser-included offense of simple possession of methamphetamine (RP at

At trial, Trooper Carroll testified that he had seventeen years of experience as a law enforcement officer, with specialized training on drug enforcement (RP at 250). He testified that he had made more than 1100 drug arrests in his career (RP at 252). He testified that in his experience, a general methamphetamine user

typically carries enough methamphetamine for only a few days' supply because they usually cannot afford to buy more than that (RP at 252). He testified that the street value of methamphetamine at that time in Kittitas County was on the low end \$40 a gram up to \$125 depending on the purity (RP at 252). He testified that when making arrests for personal use of methamphetamine, he typically saw an eighth of an ounce (referred to as an "eight ball") or smaller amounts and some way to ingest the drugs: a pipe, straw, spoon, needle, syringe, etc. (RP at 253).

He testified in his experience with people selling drugs, they typically have larger amounts and a scale, packaging materials for breaking up the amount they have, and even a ledger or list of who they are selling drugs to (RP at 253 – 54).

Trooper Carroll testified that on June 23, 2014 he was working traffic enforcement and stopped the defendant driving a motorcycle for speeding (RP at 255 – 56). Mr. Groves gave the officer his license but did not have a motorcycle endorsement and didn't provide any documentation regarding ownership of the motorcycle or insurance (RP at 257). Mr. Groves appeared to be very nervous during the contact with the Trooper, talking very fast, rapidly changing subjects, and not responding to questions (RP at

257, 258). The bike was painted black all over and seemed to have equipment that wasn't standard or original to the bike on it; it was missing any manufacture markings (RP at 257). Deputy McKean testified that the bike was very odd looking (RP at 306).

The Trooper was suspicious of the bike because in his experience, sometimes when cars or motorcycles are stolen, they are painted over and markings are removed (RP at 258). Mr. Groves told Trooper Carroll that "Christian White" owned the motorcycle (RP at 258). He told the Trooper he was coming from Easton to his home on Highway 97, which did not make sense to the Trooper based on the location of the stop (RP at 259). He told the Trooper he'd been working on the bike since November, 2013 (RP at 259 – 60).

The license plate that was attached to the motorcycle was not the correct license plate for that motorcycle: it was supposed to be on a Honda (RP at 260). Mr. Christian White was the registered owner listed for the license plate that was attached to the bike (RP at 261). In trying to establish ownership of the bike, Mr. Groves scratched off paint from the frame of the bike so Trooper Carroll could read the VIN and the bike was a Kawasaki (RP at 261). Originally, a search of the VIN indicated no record of

ownership (RP at 262). The Trooper's suspicions were aroused that the motorcycle was possible stolen (RP at 262). Eventually it was discovered the first VIN was incorrect and when the Trooper researched the correct VIN, the motorcycle was registered to "Jessica Jones" with a Bremerton, WA address. (RP at 262).

The Trooper was planning to seize the motorcycle to determine who the true owner of the motorcycle was pursuant to law (RP at 263). Also, pursuant to Washington State Patrol policy, the motorcycle was to be impounded because it was being ridden by a rider who did not have a motorcycle endorsement (RP at 264). The motorcycle had no legal license plate and was not street legal (RP at 265). The Trooper seized the bike for these purposes and released Mr. Groves from the scene (RP at 266).

As the Trooper was impounding the motorcycle, he began to complete and impound form to note the VIN, the owner, the rider and anything that is on the bike is inventoried for safekeeping (RP at 266). Trooper Carroll and Deputy McKean both testified that many motorcycles have a storage compartment under the seat as a place to keep documents like registration, proof of insurance, or a wallet. (RP at 267, 307). It is common during stops of

motorcycles for the riders to keep their ownership documents under the seat (RP at 267).

Deputy McKean who had arrived on scene to assist looked under the seat of the motorcycle to see if he could find any ownership documents (RP at 267, 308). He found a reddish brown zippered case similar to the kind you would find an owner's manual stored in that is common to keep documents of ownership inside (RP at 268). Inside the case were two baggies of methamphetamine (RP at 268, 298). One bag had 12.3 grams of methamphetamine, the other had 7.4 grams of methamphetamine (RP at 297 – 98, 298). There was also a glass pipe with white residue in the bowl and 28 smaller baggies that the Trooper recognized as the type someone might use to break apart larger quantities of drugs into smaller amounts for sale (RP at 268). Additionally there was a dollar bill that was wadded up and one oxycodone pill (RP at 268, 296). The Trooper testified that in his opinion, the quantity of methamphetamine was not a user quantity (RP 271). The street value of the methamphetamine that was found was \$1900.00 (RP at 288).

Also under the seat was a second small black zippered bag that had a digital scale inside it with white residue on it (RP at 269). The Trooper also testified that drugs are often purchased by quantity, so a digital scale is used to ensure that the buyer and seller agree on the weight before the drugs are purchased (RP at 276). On cross examination Trooper Carroll testified that the pipe was indicative of personal use, but that people who deal drugs are also oftentimes users (RP at 279).

Defense moved to dismiss at the close of the state's case, specifically regarding their position that the state had failed to prove "intent to distribute." (RP at 315). The court denied the motion, indicating there was circumstantial evidence presented by the state regarding intent to distribute (RP at 316).

The state proposed WPIC 55.01 and 55.02 regarding possession of a legend drug (CP at 39). When reviewing the jury instructions, the court pointed to the absence of language regarding a prescription and specifically inquired of defense on their position. (RP at 321 – 22). Defense used the words "except as authorized by law," but raised no objection to using the "to convict" WPIC as provided by the state, without the phrase, "without a valid prescription" or the words, "unlawfully" as

written in the WPICs. (RP at 322). In reviewing defense instruction, they proposed 55.01 with the phrase, “except upon the order or prescription of a physician,” but the court used an instruction that used the phrase, “without lawful authority” over the state’s proposed instruction. (RP at 324, CP at 44). Defense’s requested WPIC 55.02 to convict instruction on the possession of a legend drug count was identical to the state’s and used the phrase, “unlawfully possessed” and this was the instruction given by the court (CP at 44, 53, 63).

The jury found the defendant guilty as charged with possession of methamphetamine with intent to deliver and possession of a legend drug (RP at 362, CP at 73, 75). The defendant was sentenced to ninety months in prison on count one, ninety days on count two and twelve months of community custody imposed on count one, consecutive to his unrelated case 14-1-00176-1 Kittitas County. (RP at 371 – 72, CP at 76 – 88). The court waived the attorney fees, the court costs, and the booking fee (RP at 372, CP at 81). The record does not indicate that the court specifically inquired about the defendant’s ability to pay legal and financial obligations.

D. ARGUMENT

a. THE COURT ISSUED CLEAR AND COMPREHENSIVE ORAL FINDINGS OF FACTS AND CONCLUSIONS OF LAW

CrR 3.6(b) requires courts to enter written findings of facts and conclusions of law. The findings must be sufficiently specific to permit meaningful review. In re LaBelle, 107 Wn.2d 196 (1986). When a trial court's oral decision sufficiently set forth its reasons for denying motions to suppress, failure to enter written findings and conclusions is harmless error. State v. Riley, 69Wn.App. 201 (1992); State v. Apodaca, 67 Wn. App. 736 (1992) (remand is unnecessary when oral opinion is comprehensive); State v. Rowe, 63. 750 (1991); State v. Smith, 76 Wn. App. 9 (1994). If the court of appeals lacks sufficiently specific findings necessary to review the trial court's decision on the legality of the suppression issue presented to the trial court, the case should be remanded to the trial court for findings. State v. Barber, 118 Wnd.2d 335 (1992).

In this case, the issue raised by defense was based on their reading of Arizona v. Gant¹, and moved to suppress the evidence pursuant to their own motion and direct examination of the officer based upon that theory. It is clear in the court's ruling that the court did not believe Arizona v. Gant applied to the facts of this case and that the officer was acting with impound authority. The court made this finding clearly on the record with no ambiguity. This is the kind of case where remand to enter findings would be a perfunctory task as the court's ruling on the issues raised by defense is clear: there was no automobile exception like in the Gant case; this was an impound inventory and lawful.

The possible dispute about a factual finding only relates to the difference in whether the seat was locked onto the bike or not, which would not impact the court's finding that the search was a lawful inventory search. The court was clear on its function to weigh the credibility of the witnesses at the hearing: Trooper Carroll and the defendant. He believed the Trooper's testimony that the

¹ 556 U.S. 332 (2009)

seat was not locked onto the bike and he lifted it up in order to search for ownership information. The state concedes written findings are required and appropriate, but the lack of them in this case does not require reversal, at most it would require remand to enter those findings that are clear from the court's oral findings.

- b. **TROOPER CARROLL'S ACTIONS IN LOOKING UNDER THE MOTORCYCLE SEAT AND INTO THE ZIPPERED POUCHES HE FOUND WERE FOR THE LAWFUL PURPOSE OF IMPOUNDING THE MOTORCYCLE AND WERE MADE IN AN EFFORT TO DETERMINE OWNERSHIP OF THE MOTORCYCLE.**

A vehicle may be lawfully impounded (1) as evidence of a crime, when the police have probable cause to believe the vehicle has been stolen or used in the commission of a felony offense; (2) under the "community caretaking function" if (a) the vehicle must be moved because it has been abandoned, impedes traffic, or otherwise threatens public safety or if there is a threat to the vehicle itself and its contents of vandalism or theft *and* (b) the defendant, the defendant's spouse, or friends are not available to move the vehicle; and (3) in the course of

enforcing traffic regulations if the driver committed a traffic offense for which the legislature has expressly authorized impoundment. State v. Williams, 102 Wn.2d 733, 742-43, 689 P.2d 1065 (1984) (citing State v. Simpson, 95 Wn.2d 170, 189, 622 P.2d 1199 (1980)).

However, if there is no probable cause to seize the vehicle and a reasonable alternative to impoundment exists, then it is unreasonable to impound a citizen's vehicle. State v. Houser, 95 Wn.2d 143, 153, 622 P.2d 1218 (1980); State v. Hill, 68 Wn. App. 300, 305, 306, 842 P.2d 996 (1993) (even when authorized by statute “impoundment must nonetheless be reasonable under the circumstances to comport with constitutional guaranties”; “in Washington, impoundment is inappropriate when reasonable alternatives exist”); State v. Bales, 15 Wn. App. 834, 837, 552 P.2d 688 (1976); see In re Impoundment of Chevrolet Truck, 148 Wn.2d 145, 151 n.4, 60 P.3d 53 (2002). Reasonableness of an impoundment must be assessed in light of the facts of each case. State v. Coss, 87 Wn. App. 891, 898 943 P.2d 1126 (1997) (citing State v. Greenway, 15 Wn. App. 216, 219, 547 P.2d 1231 (1976)). Impound was proper because

the vehicle threatened public safety, defendant had been arrested for driving with a suspended license, and the officer explored reasonable alternatives to impoundment; moreover, the trial court did not abuse its discretion when it denied the motion to suppress because the record supported the officer's decision to impound, he followed all standard procedures, an e-mail written by the officer did not show that the search was pretextual, and the officer was not required to obtain consent before conducting the inventory search. State v. Tyler, 177 Wn.2d 690, 302 P.3d 165 (2013).

In this case, there was no reasonable alternative to impoundment available to Trooper Carroll. He was standing in an area that presented real risks to leaving the motorcycle in the middle of the night without a driver. The person driving the motorcycle had no endorsement and had no proof he had legal possession of the motorcycle. The motorcycle had an illegal license plate and was not street legal: the license plate attached to the motorcycle belonged to a different motorcycle. The registered owner was listed as living in Bremerton, a town more than one hundred

miles away from Ellensburg. There was no registration or ownership documentation with the bike or presented by the rider.

In an effort to determine ownership for purposes of completing the inventory impound, Trooper Carroll looked under the seat of the motorcycle, a place he commonly knew contained this type of documentation. The strongest evidence that the Trooper's search was related to inventory and not pre-textual is that he had already released the defendant from the scene. If his search were for evidence or investigatory, why would he release a suspect from the scene? He issued the infraction and released the defendant and continued to attempt to verify ownership of the motorcycle by looking for a registered owner. The normal methods to determine ownership: neither the driver providing information, legal documentation, nor the license plate was available to the Trooper. Additionally, even the investigation on the VIN caused some initial concern to the Trooper.

The direction and extent of inventory searches must be restricted to effectuating the purposes which justify their

exceptions to the Fourth Amendment. United States v. Edwards, 577 F.2d 883 (5th Cir. 1978). A noninvestigatory inventory search of an automobile is proper when conducted in good faith for the purposes of (1) finding, listing, and securing from loss during detention property belonging to a detained person; (2) protecting police and temporary storage bailees from liability due to dishonest claims of theft. State v. Gluck, 83 Wn.2d 424, 518 P.2d 703 (1974); State v. Montague, 73 Wn.2d 381, 385-87, 438 P.2d 571 (1968).

The facts of this case clearly indicate that the officer's purposes in looking under the seat as well as looking into the two zippered pouches found under the seat were to investigate the true and actual owner of the car for impound purposes and were not investigatory or exploratory in nature.

- c. **THERE IS SUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION FOR POSSESSION WITH INTENT TO DELIVER WHEN THERE WAS A LARGE AMOUNT OF METHAMPHETAMINE PACAKAGED SEPERATELY WITH PACKING MATERIALS FOR SMALLER QUANTITIES AND A SCALE**

The standard of review for sufficiency of the evidence is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)); accord, e.g., State v. Aver, 109 Wn.2d 303, 310-11, 745 P.2d 479 (1987); State v. Guloy, 104 Wn.2d 412, 417, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). Mere possession of a controlled substance is generally insufficient to establish an inference of intent to deliver. State v. Darden, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002); see also State v. Brown, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993). Rather, at least one additional factor must be present. State v. Zunker, 112 Wn. App. 130, 136 (2002). In Zunker the Court of Appeals affirmed the conviction of a man arrested while possessing only 2.0 grams of methamphetamine. Id. at 133. While recognizing the amount of methamphetamine was insufficient by itself to prove the intent to deliver element, the court cited the

"scales bearing meth residue, notebooks with names and credit card numbers, a cell phone battery, and meth ingredients" as sufficient evidence to support a conviction. Id. at 136. Even though evidence may be consistent with personal use, it is the duty of the fact finder, not the appellate court, to weigh the evidence. Id. at 136-37.

The question consistently asked by appellate courts is whether there is enough evidence given to the jury to consider whether the possession was for personal use or for delivery. Here there was ample evidence of delivery: the quantity, the scale, the separate packaging, as well as the twenty-eight smaller bags consistent with packing for sale. The jury evaluated the testimony, the instructions, including the proposed defense instruction for simple possession and was convinced of possession with intent. There was sufficient evidence presented to support the verdict.

- d. THE JURY WAS INSTRUCTED WITH THE STANDARD WPIC INSTRUCTION AS PROPOSED BY DEFENSE WHICH WAS AN ACCURATE AND CORRECT STATEMENT OF THE LAW REGARDING POSSESSION OF A LEGEND DRUG

Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. Victor v. Nebraska, 511 U.S. 1, 5-6 (1994). Instructions must properly inform the jury of the applicable law, not mislead the jury, and permit each party to argue its theory of the case. State v. LeFaber, 128 Wn.2d 896, 903, 913 P.2d 369 (1996). It is not error to refuse to give a specific instruction when a more general instruction adequately explains the law and allows each party to argue its theory of the case. State v. Schulze, 116 Wn.2d 154, 168, 804 P.2d 566 (1991). It is reversible error to instruct the jury in a manner relieving the State of its burden to prove every element of a crime beyond a reasonable doubt. Sullivan v. Louisiana, 508 U.S. 275, 280-81 (1993). A challenged jury instruction is reviewed de novo, in the context of the instructions as a whole. State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995) (citing State v. Benn, 120 Wn.2d 631, 654-55, 845 P.2d 289 (1993)). Pattern instructions have the advantage of thoughtful adoption and provide some uniformity in

instructions throughout the state. State v. Bennett, 161 Wn.2d 303, 307, (2007).

The defendant was charged in count two with possessing a legend drug in violation of RCW 69.41.030 (1), oxycodone. WPIC 55.01 suggests the instruction:

It is a crime for any person to possess a legend drug [except upon the order or prescription of a *[physician] [osteopathic physician and surgeon] [optometrist] [dentist] [podiatric physician and surgeon] [veterinarian]* [(fill in blank with other medical practitioner from RCW 69.41.030)] *[or] [except as authorized by law]*

With the “Note on Use” to use the bracketed (also italicized in the version provided on the Washington State Courts website) material as applicable. While the WPIC here is shorter than the RCW, it does not contain the entire list of possible prescribing entities as provided by the whole RCW, it is a correct and concise statement of the law.

- e. EVIDENCE SUGGESTING THE TROOPER WAS INITIALLY SUSPICIOUS THAT THE MOTORCYCLE WAS STOLEN WAS NOT 404(b) EVIDENCE AND WAS PROPERLY SUBMITTED TO THE JURY TO EXPLAIN THE CONTEXT AND EXTENT OF THE TROOPER’S INVESTIGATION.

Evidence Rule 404(b) establishes that in order to be admissible, certain character evidence must be admissible for a reason other than to show the defendant acted in conformity with another bad act, crime, or wrong. In this case, the evidence presented to the jury about the Trooper's investigation as to the nature and ownership of the motorcycle was not improper character evidence. Although initially suspicious about the motorcycle, his ultimate determination that the motorcycle did not appear to be stolen was evidenced at the scene by his release of the defendant. He testified to this fact to the jury. Defendant claims this evidence is 404(b) evidence of another bad act or crime, but that is a mischaracterization of the purpose of the evidence and the way the state argued the evidence to the jury. The defendant was never charged with stealing the motorcycle. The police investigation as to the actual owner of the motorcycle was based on the circumstances in the case and was not used against the defendant to show conformity in any way. The investigation of the motorcycle was submitted to the jury only to give a context

for the officer's actions, specifically why he was looking under the seat for the documentation regarding ownership.

f. **REMAND IS APPROPRIATE FOR THE SINGLE ISSUE OF WHETHER THE DEFENDANT HAS THE PRESENT OF FUTURE ABILITY TO PAY DISCRETIONARY LEGAL AND FINANCIAL OBLIGATIONS**

Consistent with State v. Blazina, the court is required to inquire about a defendant's ability to pay discretionary legal and financial obligations. 182 Wn.2d 827 (2015). Here, the court struck several discretionary obligations based on the court's understanding of the defendant's age and how long his prison term will be, but did not specifically inquire about his present or future ability to pay before imposing the discretionary "drug enforcement fee." Remand is proper for such inquiry.

E. **CONCLUSION**

For the reasons stated, the defendant's sentence and convictions should be affirmed and the case should be remanded for the court to inquire about the defendant's ability to pay legal and financial obligations and or to enter written findings regarding the suppression motion the court denied.

/s/

/s/ Jodi M. Hammond
Attorney for Respondent
WSBA #043885

APPELLATE COURT OF THE STATE OF WASHINGTON

DIVISION III

State of Washington,)	
)	No. 33874-6-III
Respondent.)	
)	AFFIDAVIT OF MAILING
JOEL M. GROVES,)	
Appellant.)	
_____)	

STATE OF WASHINGTON)
) ss.
 County of Kittitas)

The undersigned being first duly sworn on oath, deposes and states:

That on the 30th day of June, 2016, affiant an electronic copy directed to Court of Appeals and a hard copy in the mail to appellant's attorney:

Renee Townsley	Travis Stearns
Court of Appeals	Cail Musick-Slater Rule 9 Extern
Division III	Washington Appellate Project
500 N. Cedar Street	1511 Third Avenue, Suite 701
Spokane, WA 99210	Seattle, WA 98101

containing copies of the following documents:

- (1) Affidavit of Mailing
- (2) Respondent's Brief

Theresa Burroughs

SIGNED AND SWORN to (or affirmed) before me on this 30th day of June, 2016.

Lorraine A. Hill

 NOTARY PUBLIC in and for the
 State of Washington.
 My Appointment Expires: 09-10-17

